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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 595

CHARLES GARVIN and
E. L. ISENBERG, - - - - - Petitioners,

versus

WILLIAM HARRY CHILDERS, - - Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND REQUEST FOR DAMAGES FOR UNWARRANTED DELAY.

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND REQUEST FOR DAMAGES FOR UNWARRANTED DELAY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

William Harry Childers, Respondent herein, prays that the request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on June 26 of 1967 be denied. The Respondent also respectfully requests the Court to award damages to the Respondent for unwarranted delay in the satisfaction of his judgment obtained in the United States District Court for the Western District of Kentucky.

I. CITATION TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Petitioners' Appendix, pages 9-10.

II. JURISDICTION.

The jurisdiction of this Court is sought pursuant to the provisions of 28 USC Sec. 1254(1).

III. QUESTIONS PRESENTED.

1. Have the Petitioners raised an issue over which this Court has jurisdiction?

2. Even if the Lower Court erred in excluding the deposition of the absent witness, was such error harmless and of no effect upon the result of the trial?

3. Is the Respondent entitled to damages for unwarranted and unreasonable delay as authorized by 28 USC Sec. 1912(19) and Rule 56(2) of the United States Supreme Court?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Petitioners maintain that the Fifth Amendment to the Constitution of the United States is involved which the Respondent denies. The applicable portions of Fed. R. Civ. P. 26(d)(3)-3 and the Fifth Amendment are printed in Petitioners' brief on page 2.

V. COUNTER-STATEMENT OF CASE.

The Petitioners' statement is substantially correct, but fails to disclose two important facts.

First, even though it is alleged that the witness, Gross, was sick and infirm within the meaning of Fed. R. Civ. P. 26(d)(3)-3, he was not sufficiently sick and infirm to require medical attention.

Second, several other witnesses observed the incident in question and testified at the trial for the Petitioners.

VI. ARGUMENT.

Question I.

Have the Petitioners raised an issue over which this Court has jurisdiction?

The question which the Petitioners seek to raise concerns the reading of a deposition of an absent witness at a civil trial for damages. The learned trial judge overruled Petitioners' request and the entire record was thoroughly reviewed by the United States Court of Appeals for the Sixth Circuit.

A cursory examination of the Petitioners' brief discloses that the principle involved is only of alleged importance between the parties. A writ of certiorari is not conferred merely to give the defeated party in the Lower Courts another hearing. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

The only reference in the Petitioners' brief that even pretends to invite the attention and jurisdiction

of the Court to grant the writ of certiorari is a vague reference to "Public Interest and Concern" in the last paragraph. Rule 19[1] of the Supreme Court of the United States sets forth "Considerations Governing Review on Certiorari." The Petitioners' brief discloses absolutely no basis within the purview of Rule 19 for the Court to invoke its jurisdiction. Certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453.

Petitioners fail to make any allegation of a conflict between the various Courts of Appeal in either

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[1]Rule 19: *Considerations Governing Review on Certiorari.* 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. 2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

the interpretation or application of Fed. R. Civ. P. 26(d)(3)-3. In fact Petitioners' brief concedes the frivolity of his claim by failing to cite a single case in point.

In the absence of an allegation of a question of public importance or a conflict between the various Courts of Appeal, the Supreme Court of the United States does not have jurisdiction to review a case on a writ of certiorari.

Question II.

Even if the Lower Court erred in excluding the deposition of the absent witness, was such error harmless and of no effect upon the result of the trial?

FR 61[2] requires that all errors which no not affect the substantial rights of the parties must be disregarded. The testimony contained in the deposition of Gross could not have affected the outcome of the trial. The deposition was short and contained no absolute identification or association of the plaintiff with improper conduct as asserted by the defendants. *Most of the asserted facts which might have aided the defendants in the presentation of their case are contained in Gross' after trial affidavits rather than the offered deposition.* Defendants' own statement of facts ad-

[2]Fed. R. 601.01: *Harmless Error.* No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties.

mits that Gross was not present when Mr. Isenberg beat and arrested the plaintiff.

The lack of substantive value contained in the testimony of Gross's deposition was recognized by defendants' trial counsel. Defendants' trial counsel stated to the Court:

> "Mr. Huddleston: —but to clarify our position, the practical consideration here is not the import of the testimony itself. The deposition taken does support the position of the defendants in this case. Our practical consideration is that the failure to appear and give any evidence, in the absence of anything to the contrary shown by the jury, can be construed by the jury or by counsel, as the suppression of testimony which by inference might be regarded as unfavorable to the position of the defendants and in pursuing the matter at this time, I ask the Court, having overruled our request to read the deposition, to advise counsel not to make that sort of inference in closing argument . . .
>
> The Court: . . . You don't want your arguments taken down do you?
>
> Mr. Huddleston: Yes, I am afraid so, because I am afraid Mr. English is going to speak about this absent witness.
>
> The Court: He may not do it. He may not court that error.
>
> Mr. Huddleston: If I feel sure that he won't do it.
>
> Mr. English: I haven't heard your argument yet.
>
> The Court: Well, if you can agree to leave it out unless you are willing, just say nothing about it.

Mr. Huddleston: I would agree to this, say nothing.

The Court: The jury knows nothing about it one way or the other. As a matter of fact, I doubt if the jury remembers anything, his name being used in the case. I know I didn't, so why not let the thing go and say nothing about it and won't have to take this argument down. Is that agreeable?

Mr. English: Yes, sir."

Defendant's trial counsel, recognizing the lack of practical import of the substantive testimony contained in Gross's deposition, did not pursue the matter further when it was agreed that no reference to Gross's failure to testify would be mentioned in the closing argument and consequently any possible error was cured.

Exclusion of evidence is harmless where the evidence, though admissible, is of little or no value in determining the issues in the case. *Barron and Holtzoff, Federal Practice and Procedure,* Sec. 1353 (Rules Edition 1961—1966 Pocket Part).

Any facts which could have been established by reading Gross's deposition were already established by other witnesses. Gross's deposition contained no first hand facts that were peculiarly within Gross's knowledge. Other persons who testified were present at all times with Gross and accounted for anything which he might have observed. The defendants' witness, Young, was present at the Go-Cart tracks the entire period and the defendant, Garvin, was with Gross the remainder of the time. No event or period of time could be exclusively accounted for by Gross. At most, his

testimony would have been cumulative. Any error in excluding evidence of a fact already established by other evidence is harmless. *Barron and Holtzoff, Federal Practice and Procedure,* Sec. 1353 (Rules Edition 1961); *Smith* v. *Bear,* 237 F. 2d 79, 89 (2d Cir. 1956); and *E. I. DuPont De Nemours and Company* v. *Wright,* 146 F. 2d 765, 768 (6th Cir. 1945); Certiorari denied 65 S. Ct. 1017, 324 U. S. 873, 89 L. Ed. 1426.

Question III.

Is the Respondent entitled to damages for unwarranted and unreasonable delay as authorized by 28 USC Sec. 1912(19) and Rule 56 of the United States Supreme Court?

In these turbulent times when the Bar, Courts and Government are under close public scrutiny and when public attitude must be respectfully cognizant of law, order and the judicial processes, the Respondent submits that the Courts must jealously guard the channels of justice to assure the public that they do not become clogged with cases involving parties who seek to delay rather than respect and abide by the Courts' decisions.

The petition and record filed with the Court in this case show nothing more than a frivolous attempt to delay a young man from obtaining justice. The only reason this petition was filed was to delay satisfaction of the judgment below. The Petitioners have been unable to raise any sincere appealable issues. The only point which they have sought to raise concerns the reading of the deposition of the absent witness and the Respondent respectfully submits that this issue is wholly frivolous, vexatious and without merit. This

point is borne out by the colloquy and admissions of Petitioners' counsel that occurred at the bench during the course of the trial. (This colloquy is printed in the discussion of the Respondent's second question.)

28 USC Sec. 1912[3] and Rule 56(2)[4] of the United States Supreme Court specifically authorize the Court to award damages as a penalty for unwarranted delay. The only way this Court can discourage frivolous and vexatious petitions is to exercise its power to award damages in proper cases where the parties have been subject to delay without reasonable cause. The Court's power to compensate for unwarranted delay should not be overruled. *Whitney* v. *Cook,* Miss. 1879, 99 U. S. 607, 9 Otto. 607, 25 L. Ed. 446; *Mason* v. *Summer Lake Irr. Dist.,* C. A. Or. 1954, 216 F. 2d 609, certiorari denied 75 S. Ct. 357, 348 U. S. 937, 99 L. Ed. 734, rehearing denied 75 S. Ct. 450, 348 U. S. 960, 99 L. Ed. 749.

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[3]28 USC Sec. 1912: *Damages and costs on affirmance.* Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

[4]Rule 56: (U. S. Supreme Court) *Interest and Damages.* (2) In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

VII.

CONCLUSION.

For the foregoing reasons, the Petitioners' certiorari should be denied and the Respondent awarded damages for unwarranted delay.

Respectfully submitted,

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Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I, Maxey B. Harlin, Counsel for William Harry Childers, Respondent, in the matter styled "Charles Garvin and E. L. Isenberg v. William Harry Childers," do hereby certify that I served a true copy of the foregoing Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and Request for Damages for Unwarranted Delay on the Petitioners on _____, 1967, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Marshall Funk, 408½ East Tenth Street, Bowling Green, Kentucky and Paul Huddleston, 1032 College Street, Bowling Green, Kentucky, Counsel for Petitioners.

MAXEY B. HARLIN.